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Supreme Court, U.S.
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No. 01-1084

In The
Supreme Court of the United States

ALLISON DESMOND, *et al.*,
Petitioners,
vs.
BANKAMERICA CORPORATION,
JOSEPH HEMPEN, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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19 pp

QUESTIONS PRESENTED

Whether the provisions of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B), stating that control of a securities class action shall vest in one or more lead plaintiffs, who shall presumptively be the member or members of the purported plaintiff class having the largest financial interest in the relief sought by the class, create a federal right in the lead plaintiffs to control the class action.

Whether the federal right created by the PSLRA of the lead plaintiffs to control a class action can be given its intended scope unless a federal court may enjoin a state court proceeding vesting control of the claims asserted in the class action in members of the purported plaintiff class having a lesser financial interest in the relief sought by the class, so that Congress, in enacting the PSLRA, "expressly authorized" federal courts to grant an injunction to stay proceedings in a State court, within the meaning of that phrase as used in the Anti-Injunction Act, 28 U.S.C. § 2283.

PARTIES

The petition does not individually list the petitioners other than Allison Desmond. Respondents assume that the other petitioners are the persons who were appellants in the Eighth Circuit. These persons are Neil Koni, Ted Kraftsow, Richard Levy, and Lani Rothstein, who along with Ms. Desmond were plaintiffs in the enjoined state-court action; and Ernesto Gumapas, Mark Luniewski, Bruce O'Such, Sidney Sorkin, and Dr. Herman Shyken, who were the non-plaintiffs proposed to serve as class representatives in the enjoined state-court action. *See infra* at 4-5.[1]

Respondents Joseph Hempen, Robert Hepworth, John M. Koehler, David P. Oetting, and Pamela Wootton, along with Earl J. Gates Sr., recently deceased, were the lead plaintiffs appointed to represent the NationsBank Classes in the district court. These respondents moved for the injunction that is the subject of the petition for certiorari, and were respondents before the Court of Appeals.

Respondents David Fike, Selma Kaiser, Brian Markee, Elizabeth Menkes, Walter E. Ryan, Jr., and Patricia A. Thomas were the lead plaintiffs appointed to represent the BankAmerica Classes in the district court. They were respondents before the Court of Appeals.

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[1] Ms. Desmond and Messrs. Koni and Kraftsow were originally proposed as class representatives in the state court action. Mr. Koni was withdrawn as a proposed class representative after defendants discovered his history of criminal convictions and civil fraud. (*See* App. 3, 21.)

Respondents Bank of America Corporation (the "Bank"), David A. Coulter, James H. Hance Jr., John J. Higgins, Hugh L. McColl Jr., Marc D. Oken, and Michael E. O'Neill were defendants in the district court. These respondents neither supported nor opposed the issuance of the injunction in the district court and took no position on the issue in the Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

FACTUAL BACKGROUND 3

REASONS FOR DENYING THE PETITION 11

CONCLUSION 13

TABLE OF AUTHORITIES

Pages

Anti-Injunction Act, 28 U.S.C. § 2283 i

Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B) i

Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 112 Stat. 3227, 3233 (1998) .. 2, 5

In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.), 770 F.2d 328 (2nd Cir. 1985) 12

In re BankAmerica Corp. Securities Litigation, 78 F. Supp.2d 976 (E.D. Mo. 1999) 4, 8

In re BankAmerica Corp. Securities Litigation, 95 F. Supp.2d 1044 (E.D. Mo. 2000) ..... *passim*

In re BankAmerica Corp. Securities Litigation, 263 F.3d 795 (8th Cir. 2001) ..... *passim*

Bank of America to Settle Shareholder Suits, Wall Street Journal, Feb. 11, 2002 1

STATEMENT OF THE CASE

The petition for certiorari seeks review of an opinion of the Court of Appeals for the Eighth Circuit affirming the issuance of an injunction by the District Court for the Eastern District of Missouri of a state court action pending in the State of California.

On appeal to the Eighth Circuit, petitioners herein did not challenge any of the factual findings made by the district court. The relevant factual findings are stated in the decision of the district court, *In re BankAmerica Corp. Securities Litigation*, 95 F. Supp.2d 1044 (E.D. Mo. 2000), reproduced at pages 18–38 of the Appendix, and in the opinion of the Court of Appeals, *In re BankAmerica Corp. Securities Litigation*, 263 F.3d 795 (8th Cir. 2001), reproduced at pages 1–17 of the Appendix.

Two items should be noted as preliminary matters.

First, the case below has recently been settled, subject to final court approval, by the defendants' agreement to pay the plaintiff classes the sum of $490 million. *See Bank of America to Settle Shareholder Suits*, Wall Street Journal, Feb. 11, 2002, at A11. In exchange for this payment, the plaintiff classes have agreed to release defendants and all related persons from liability for any claim that had been or could have been asserted in the case, including all claims relating to the D. E. Shaw-related losses or arising out of the merger that formed the Bank.

This release, once effective, will release all of the claims asserted by petitioners on behalf of their putative classes in

the state court action, excepting only those claims asserted by or on behalf of the approximately 2200 persons who have opted out of the federal class action.

Second, the petition for certiorari asks this Court to resolve a legal issue that is unlikely to arise in future cases. On November 3, 1998, a few days after petitioners filed their state court actions, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 112 Stat. 3227, 3233 (1998), became effective. SLUSA bars the filing in state court of securities class actions for classes comprised of more than 50 members, and requires any securities class actions improperly filed in state court be removed to federal district court.

Due to the enactment of SLUSA, the Eighth Circuit's decision will not likely apply to future cases because the circumstances that authorized the injunction approved by the Eighth Circuit arise only where competing state and federal securities class actions were filed during a brief period beginning on the effective date of the PSLRA, December 22, 1995, and ending on the effective date of SLUSA, November 3, 1998. (*See* App. 11-12.)

The settlement mooting the dispute, and the change in the law making the issue here unlikely to be repeated, both weigh against a grant of certiorari.

FACTUAL BACKGROUND

In October and November 1998, 24 lawsuits were filed in six federal district courts by shareholders of the Bank and its two predecessor entities, BankAmerica Corporation and NationsBank Corporation. BankAmerica and NationsBank merged September 30, 1998. The Multidistrict Litigation Panel ordered the cases consolidated and transferred to the Eastern District of Missouri, and appointed Senior United States District Judge John F. Nangle, chairman of the Multidistrict Litigation Panel, to preside over the consolidated cases. (App. 2-3).

One of the 24 federal cases was filed by Lani Rothstein, a petitioner herein. Ms. Rothstein's federal case was filed on her behalf, and on behalf of the classes the district court ultimately certified, by the law firm of Milberg Weiss Bershad Hynes & Lerach ("Milberg Weiss"). (App. 3).

Simultaneous with filing the federal *Rothstein* case, Milberg Weiss filed five parallel cases in California state court, including *Allison Desmond vs. BankAmerica Corporation* ("*Desmond*") and a separate case for Ms. Rothstein. The five California state court cases filed by Milberg Weiss were ultimately consolidated in the *Desmond* case. (App. 3).

In December 1998 competing motions for appointment as lead plaintiff and lead counsel were filed in the consolidated federal case. When it became clear that petitioners lacked the financial stake to become lead plaintiffs in the federal case, and thereby select Milberg Weiss as lead counsel, Milberg Weiss dismissed its federal case to focus on

the California cases where no financial stake rules govern the selection of lead plaintiff and lead counsel. (App. 19).

The district court certified the consolidated federal cases as a class action, certifying four separate classes on July 6, 1999. The four classes and their distinct, and conflicting, claims are described in detail in the district court's order denying in part and granting in part defendants' motion to dismiss. The gist of the claims was that each group of shareholders, the NationsBank shareholders on the one hand and the BankAmerica shareholders on the other, alleged that the other received too large a share in the merged Bank. *In re BankAmerica Corp. Securities Litigation*, 78 F. Supp.2d 976, 993-1000 (E.D. Mo. 1999).

No class has been certified in *Desmond*. Initially, Milberg Weiss sought certification of a single class, comprised of both NationsBank and BankAmerica shareholders, notwithstanding the conflict in their positions. Milberg Weiss initially proposed three individuals as class representatives, but withdrew one after the Bank discovered that he was a convicted felon with a history of fraudulent conduct. Although the class purported to include both purchasers and holders of stock, none of the proposed representatives was a purchaser. Thus, the proposed class representatives were not representative of all members of the class. The California state court denied this first class certification motion because of the irreconcilable conflicts of interest between the former NationsBank and BankAmerica shareholders. (App. 3-4, 21-22 & n.3).

Milberg Weiss filed a second class certification motion November 17, 1999. This motion broke the previously proposed class into five sub-classes modeled after the classes certified by the federal court, and proposed Milberg Weiss as counsel for three of the classes while adding a second law firm, Gold Bennett & Cera, as counsel for the other two. To remedy the lack of purchaser representatives among the plaintiffs, Milberg Weiss proposed that five persons not named as plaintiffs be appointed by the state court to represent the purchaser classes. (App. 4, 22-23).

The filing of this second class certification motion by Milberg Weiss provoked several reactions. Five days later, on November 22, 1999, the lead plaintiffs appointed by the district court moved to stay prosecution of *Desmond* as a class action. In addition, the Bank filed a notice of removal, removing *Desmond* to the United States District Court for the Northern District of California on the day the second class certification motion was scheduled to be argued and ruled on by the state court. The Bank contended removal was proper because the claims to be asserted by the proposed new class representatives were new claims for purposes of SLUSA, thus making the entire case removable. 15 U.S.C. §§ 77p(b)(c), 78bb(f)(1)-(2). (App. 4, 5, 23).

The district court judge, the Hon. Vaughn R. Walker, remanded *Desmond* to state court February 23, 2000, holding that the Bank had jumped the gun by filing its notice of removal before the state court had acted on the motion for class certification. In short, the district court held that removal was premature because the newly identified

persons had only been *proposed* as representatives but had not yet been appointed as such by the state court. (App. 4, 23). In the remand order, Judge Walker stated:

> In the event that parties or claims not stated in the original complaint are brought into this litigation by some mechanism other than amendment of the complaint, such as a class certification order, defendants would have 30 days in which to file a notice of removal under section 1446(b).

(App. 4, 23).

In response to the remand order, Reed Kathrein, a Milberg Weiss partner, wrote to the California state court judge expressing his law firm's intent to restructure the proposed classes to avoid future removal to federal court:

> Plaintiffs would like to resubmit a proposed order of class certification to this Court which would avoid adding new parties, yet resolve this Court's concerns with potential conflicts amongst the classes...

(App. 4-5, 24).

Milberg Weiss was in a difficult bind. Only five persons had been named as plaintiffs in the original state court complaints. These persons were not adequate to represent the interests of the five proposed classes so as to avoid conflicts of interests among the classes, yet Milberg Weiss could not add new persons as class representatives on peril

of removal to federal court and joinder with the multidistrict case as a tag-along subordinate to the lead plaintiffs and lead counsel appointed by the district court. Recognizing this difficulty, Milberg Weiss obtained the defendants' agreement to remove the *Desmond* class certification motion from the docket and to begin mediation to settle all class claims before class certification, notwithstanding that the state court had previously advised Milberg Weiss that irreconcilable conflicts prevented the law firm from representing all of the classes. (App. 5, 24).

Thus, shortly after Milberg Weiss filed a third motion for class certification in state court, it filed along with the defendants a joint motion requesting that the court remove the class certification motion from its calendar and that they be instead ordered to attempt immediately to mediate a settlement of the class claims. The state court granted the joint motion. (App. 5, 24).

At the time mediation was ordered, no depositions had been taken of the Bank or the other defendants or of any witnesses in either the federal or the state case, the defendants had not answered any interrogatories, and had produced only ten boxes of documents, a fraction of the many hundreds of boxes of documents subsequently produced to the lead plaintiffs in the federal case. (NationsBank Classes' Appeal Brief at 5).

If Milberg Weiss had engaged in discovery before rushing into mediation, it would have learned that the amount of the loan to the "secretive hedge fund" was $1.4 billion, and not the $372 million stated in the petition. *See Petition*

at 3. The $372 million was the amount of the *loss* the Bank announced on the loan on October 14, 1998. *BankAmerica* 78 F.Supp.2d at 983, 985. This error has been previously pointed out to petitioners. (NationsBank Classes' Appeal Brief at 8 n.7.)

On April 25, 2000, two days before the state-court sponsored mediation was to take place, the district court granted in part the lead plaintiffs' motion to enjoin the state court proceedings and issued the injunction. (App. 5, 24). Contrary to petitioners' assertion that "the injunction halted all proceedings in the California Superior Court," *Petition* at 8, the injunction has never barred petitioners from pursuing their individual claims in state court. It did, however, bar petitioners and their counsel from attempting to represent the interests of the classes in any capacity, including engaging in mediation. The injunction order also allowed petitioners to immediately opt out of the federal classes. (App. 6-7, 35-37).

Although the state court plaintiffs promptly opted out of the federal class action, Milberg Weiss has taken no steps to prosecute the state court plaintiffs' individual claims in the state court since the issuance of the injunction April 25, 2000.

Before issuing its injunction, the district court carefully considered the entire factual record before it and found:

> Milberg Weiss's behavior in these cases are precisely the sort of lawyer-driven machinations the PSLRA was designed to prevent. Hindsight now reveals that the simultaneous filing of suits in state and federal court was a blatant attempt at forum shopping. When the federal forum proved unsavory because Milberg Weiss would not be able to control that case, the firm simply took its marbles and went to play in the state court. In that forum, they have filed numerous inadequate motions for class certification, overlooking potential conflicts of interest among classes and failing to propose class representatives which truly represent the entire class. Furthermore, one proposed class representative was highly inadequate due to his criminal record and history of participation in fraud. They have attempted to circumvent the prohibitions of the SLUSA by adding non-party plaintiffs as class representatives, which would effectively create a new state securities law suit after the effective date of the SLUSA. When faced with the possibility that such an action would result in removal of the case to federal court, they indicated their intent to structure the classes, not in the best interests of the class members, but

> to avoid federal court at all costs. When that task proved difficult, they requested the state court to order mediation for settlement purposes, despite the fact that they do not represent the class and despite the fact that minimal discovery has been done either on the substantive issues or the damages available to class members. Clearly, the *Desmond* case is nothing more than a thinly-veiled attempt to circumvent federal law. The *Desmond* plaintiffs, and the law firm behind them, do not have the best interests of the class at heart and have proven themselves wholly inadequate to control the conduct of this suit. The Court finds their attempts to do so outrageous. Accordingly, under the facts of this case, the Court finds that an injunction is necessary to preserve the federal plaintiffs' rights under the PSLRA.

(App. 29-30).

As noted previously, petitioners in their briefs before the Eighth Circuit never challenged the district court's factual findings.

REASONS FOR DENYING THE PETITION

The decision below is the only decision by any Court of Appeals considering whether the lead plaintiff provisions of the PSLRA qualify as an "expressly authorized" exception to the Anti-Injunction Act. No other reported decision in any other case has ever even considered the issue at either the trial or appellate level. Thus, the decision of the Court of Appeals for the Eighth Circuit does not conflict with the decision of another Court of Appeals.

Not surprisingly, no state court of last resort has ruled on this issue, and the decision of the Court of Appeals for the Eighth Circuit does not conflict with the decision of any state court of last resort.

Thus, while petitioners contend that the Court should grant certiorari because of an asserted conflict among the circuits, there is no conflict.

Furthermore, even if there were some conflict among the circuits, this case is not a suitable vehicle to address such conflict. The injunction was issued under a statutory framework which no longer exists. At the time petitioners' state law suits were filed, securities law class actions were governed by the PSLRA. Within days of those suits being filed, however, the SLUSA came into effect, essentially eliminating the filing of securities class actions in state court. The particular constellation of statutes which gave rise to this case has sunk below the horizon. Thus a decision by this Court would affect, at most, the parties to this case and no other.

But, a decision by this Court will not even affect the parties to this case. The federal class actions have been settled, subject to final court approval. The defendants will pay the class members $490 million. Even if this Court were to hold that the legal basis for the injunction issued by the district court, and affirmed by the Court of Appeals, was in error, the injunction could nonetheless be sustained on the uncontroversial grounds of protecting the settlement. *See, e.g., In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 337-38 (2nd Cir. 1985) (district court had power to enjoin state court actions against federal defendants to protect those defendants from state court harassment, even though several states were plaintiffs in the court actions, where there was a "substantially significant prospect that these ... defendants will settle in the reasonably near future").

Accordingly, however the Court resolves the petition, the result will be that petitioners will have the same right they have under the terms of the current injunction: the right to prosecute their individual, opt-out claims in California state court as they see fit.

CONCLUSION

This case, which uniquely presents an issue which is of both first and last impression, does not merit consideration by the Court. The petition for certiorari should be denied.

Respectfully submitted,

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